Supreme Court, U.S.
FILED
MAR 3 - 2000
CLERK

No. 99-1110

In the Supreme Court of the United States

CAROLYN H. MAFRIGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly determined that the discretionary function exception to the Federal Tort Claims Act's waiver of sovereign immunity applies to the terms of a lease of federal land because the Secretary of the Interior has broad discretion regarding whether to lease the land and under what terms.

2. Whether the courts below correctly determined that Texas law does not recognize a tort for "negligent leasing" under the facts alleged by petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 189 F.3d 466 (Table). The final judgment of the district court (Pet. App. 39a-41a) is unreported. The district court's earlier opinion granting the United States' motion to dismiss (Pet. App. 28a-33a) is unreported. An earlier opinion of the district court setting forth applicable facts (Pet. App. 3a-27a) is reported at 893 F. Supp. 691.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1999. A petition for rehearing was denied on October 1, 1999 (Pet. App. 44a). The petition for a writ of certiorari was filed on December 30, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979 the United States purchased property in Texas from petitioner Carolyn Mafrige and her mother. Pet. App. 4a-6a. Petitioner retained a non-participating royalty interest in the property's mineral rights. *Id.* at 39a-40a.[1] In 1988, the United States leased the mineral rights for the land acquired from petitioner to the Royal Oil & Gas Company, pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. 181 *et seq.*, and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. 351 *et seq.* Pet. App. 7a. Petitioner was dissatisfied with the terms of the mineral lease, which provided for a 1/8 royalty. Based on leases of mineral rights on adjacent properties, she believed that a royalty of 3/16 or 1/4 could have and should have been obtained. *Id.* at 8a. However, the United States refused to renegotiate the lease. *Ibid.*

2. This action began as a quiet title action involving the leasehold and the royalty interests. The district court quieted title by holding that Royal Oil's successor held the full leasehold, including 7/8 of the minerals produced thereby, and that petitioner held the entire royalty interest from the lease. Pet. App. 39a-40a.

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[1] Texas courts describe a non-participating royalty as follows:

> A "non-participating royalty" does not entitle the owner to produce the minerals himself, or permit him to join in a lease of the mineral estate to which the royalty is appurtenant, or entitle him to share in bonus or delay rentals that may be paid for the lease, but merely entitles him to a share of production under the lease free of exploration and production expenses.

Pickens v. *Hope*, 764 S.W.2d 256, 264 (Tex. Ct. App. 1988).

That portion of the district court's judgment is final, was not appealed, and is not relevant to this petition.

In the quiet title action, petitioner filed cross claims against the United States with respect to the lease for (1) "concealment, continuing conduct, and reformation," (2) negligence, and (3) "breach of fiduciary duty or duty of utmost good faith." Pet. App. 9a. The district court granted the United States summary judgment with respect to the first claim (which the court interpreted as a reformation claim) based on the United States' sovereign immunity. *Id.* at 16a-17a. The petition does not relate to that claim.

With respect to the negligence and breach of fiduciary duty claims, the district court noted that such claims were brought under the Federal Tort Claims Act (FTCA), which makes state law applicable to the United States, with certain exceptions. Pet. App. 21a, 25a-26a. The district court found that applicable Texas law places no duty on a lessor with respect to the drafting of a lease. *Id.* at 21a-22a. Similarly, the district court found that under Texas law there is no claim for negligent leasing separate from the claim for breach of fiduciary duty or duty of utmost care. *Id.* at 22a-23a.

Finally, with respect to the fiduciary duty claim, the district court held that the United States was immune from such claims under the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). Pet. App. 28a-33a. In evaluating the applicability of the discretionary function exception, the district court applied the two-pronged test of *United States* v. *Gaubert*, 499 U.S. 315 (1991). First, the district court concluded that the lease involved an element of judgment or choice as part of an overall statutory scheme for managing federal mineral interests. Pet. App. 30a-31a. Second, the district court concluded that the act of entering into

the lease was grounded in public policy. *Id.* at 31a-32a. Accordingly, the district court dismissed petitioner's breach of fiduciary duty claim. *Id.* at 33a.

3. The court of appeals affirmed in an unpublished opinion for the reasons stated by the district court. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. Petitioner asserts that the lease constituted an unconstitutional taking of her property without just compensation and that the denial of her FTCA claims is a violation of the Equal Protection Clause because it treats her differently from a similarly situated Native American. Those claims were not properly raised before, nor considered by, the courts below. To the contrary, petitioner raised those claims for the first time in her petition for rehearing in the court of appeals. Accordingly, they should not be considered by this Court. See *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Dothard* v. *Rawlinson*, 433 U.S. 321, 323 n.1 (1977). In addition, as discussed more specifically below, each claim of a constitutional violation is without merit.

b. Petitioner claims that by entering into a lease with what she viewed as a below-market royalty, the government took her property without just compensa-

tion. But it is not possible for the government to effect a taking by exercising rights it had indisputably previously obtained by contract. Moreover, the district court lacked jurisdiction over any takings claim, as jurisdiction over such claims is vested exclusively in the Court of Federal Claims by the Tucker Act. 28 U.S.C. 1491; see *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985).[2]

c. Petitioner claims that her inability to obtain redress in this situation is a violation of the Equal Protection Clause because a similarly situated Native American would be able to obtain redress and because strict scrutiny would apply to any difference in treatment between herself and a Native American. Pet. 7-8, 20-23. Regardless of how a similarly situated Native American would be treated, this Court has held that classifications based on Native American tribal status and land tenure are not suspect under the Equal Protection Clause and that statutes embodying such classifications are reviewed only for a rational basis. *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-502 (1979); see *Morton* v. *Mancari*, 417 U.S. 535, 554-555 (1974) (upholding Bureau of Indian Affairs hiring preference for tribal Indians based on rational basis review and collecting cases); see also *Rice* v. *Cayetano*, No. 98-818 (Feb. 23, 2000), slip op. 22-24. Thus, even if a similarly situated Native American's land might be treated differently (which petitioner has not shown), such different treatment would be amply justified by the unique history of the relationship between Native

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[2] Petitioner's claim obviously exceeded the $10,000 jurisdictional threshold of the Tucker Act. See Pet. App. 8a (noting that petitioner's FTCA claim was for $1,899,129.82).

Americans (including their land) and the United States. See, *e.g.*, *Confederated Bands*, 439 U.S. at 500-501.

2. a. Petitioner incorrectly asserts (Pet. 6-7) that the court of appeals erred in its determination that the discretionary function exception applied to the United States' lease of the property. As petitioner agrees (Pet. 15), the proper standard for determining the applicability of the discretionary function exception is that announced by this Court in *United States* v. *Gaubert*, 499 U.S. 315 (1991). The decisions below apply *Gaubert*. Pet. App. 29a-32a (district court opinion relying on *Gaubert*); *id.* at 2a (court of appeals' opinion affirming "for essentially the same reasons" given in district court opinion). That fact alone makes review by this Court unwarranted since, if there were error below, it would at most consist of a misapplication of settled legal principles to the specific facts of this case. Moreover, because the court of appeals' brief opinion was unpublished, it did not definitively settle the law of the Fifth Circuit regarding any issue. For that reason, too, further review is unwarranted.

b. In any event, the courts below properly applied *Gaubert*. Under *Gaubert*, an act falls within the discretionary function exception if (1) it is discretionary in that it involves an element of judgment or choice and (2) it is based on considerations of public policy. *Gaubert*, 499 U.S. at 322-323. Here the district court correctly noted that relevant statutes gave the executive branch "discretion to determine the terms under which this mineral interest would be leased." Pet. App. 31a. See also 30 U.S.C. 352 (providing that "all deposits of [minerals] * * * may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof"). Indeed, this Court has previously

noted the extensive discretion granted to the Secretary by the applicable statutes. See *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965) (stating that the Mineral Leasing Act "left the Secretary discretion to refuse to issue any lease at all on a given tract"); *Boesche* v. *Udall*, 373 U.S. 472, 481 (1963) (holding that the Mineral Leasing Act "was intended to expand, not contract, the Secretary's control over the mineral lands of the United States"); see also *Dunn* v. *Ickes*, 115 F.2d 36, 37-38 (D.C. Cir.) (holding that because Mineral Leasing Act grants discretion to Secretary, court could not compel Secretary to act on lease application by mandamus), cert. denied, 311 U.S. 698 (1940).

Petitioner asserts (Pet. 15-16) that despite the statutory delegation of discretion to the Secretary, the Secretary lacked discretion because an engineer in the Bureau of Reclamation had written a letter to petitioner ten years before the lease was executed in this case stating that the government's policy was to enter into mineral leases for royalties similar to those on comparable adjoining properties. Had petitioner believed that the existence and continuation of that policy was essential to its original bargain with the government, petitioner should have seen to it that a clause to that effect was included in the deed. In any event, because such a letter could do nothing to eliminate the Secretary's statutory discretion, petitioner's argument fails. See 43 C.F.R. 1810.3 (1999) (a statement by a Department of the Interior employee does not create any rights not authorized by statute); Pet. App. 35a.

c. With respect to the second prong of the *Gaubert* analysis, this Court held that:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime. The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.

499 U.S. at 324-325. Against this presumption, petitioner argues (Pet. 19-20) that the decisions regarding the terms of the lease at issue were not policy-based because they involved only the amount of royalty that petitioner (a private party) would receive and thus had nothing to do with public policy. The courts below properly rejected that argument because the terms of the lease must be viewed as parts of an integrated whole implicating a complex weighing of competing policy interests.

The lease was made pursuant to the Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, two comprehensive statutes designed to preserve the nation's natural resources while also allowing for the extraction and retention of strategically important mineral resources. See *Boesche*, 373 U.S. at 481 (noting that the Mineral Leasing Act of 1920 was

concerned with "the prevention of an overly rapid consumption of oil resources" and that one of the statute's chief goals was "[c]onservation through control"). In leasing mineral rights, the Department of the Interior weighs multiple competing policy interests, including the governmental duties "to regulate, manage, and, in certain circumstances, limit * * * exploration and development," to "provid[e] municipal and industrial water," and to "provid[e] recreation." Pet. App. 70a-71a.

In crafting a lease, the Department of the Interior must include terms to fulfill its public policy role as protector and regulator of natural resources. Those terms may have a negative effect on the amount of royalty that can be received. Petitioner in fact alleged that "[t]erms were included in the Lease which were solely for the United States' benefit, adversely impacting the desirability of leasing the subject lands thereby reducing the amount of royalty a potential lessee may have been willing to offer." Pet. App. 57a. In order to obtain a higher royalty, as petitioner now asserts should have been done, some other concession thus would have been necessary, such as omitting terms from the lease that protect the United States' policy interests. Fixing the lease's terms in their entirety, including the royalty amount, is a discretionary act grounded in policy. The courts below correctly applied *Gaubert* and found that the negotiation and approval of the lease fell within the discretionary act exception, foreclosing the possibility of an FTCA action.

3. Finally, petitioner asserts that the courts below erred in their interpretation of Texas law with respect to her negligent leasing claim. Pet. 8, 23-25. This Court does not "normally grant petitions for certiorari solely

to review what purports to be an application of state law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 144 (1996). There is no unusual circumstance to justify departure from that general rule here.

Moreover, the lower courts correctly applied Texas law. As the district court noted, under Texas law, a claim that an executive rights holder failed to obtain an adequate royalty on behalf of a non-participating royalty interest holder is a claim of breach of fiduciary duty (or the duty of utmost good faith). Pet. App. 22a-23a; *Manges* v. *Guerra*, 673 S.W.2d 180, 183 (Tex. 1984). Accordingly, all such claims must be brought as breach of fiduciary duty (or duty of utmost good faith) claims, rather than under the non-existent tort of negligent leasing. See, *e.g.*, *Dearing, Inc.* v. *Spiller*, 824 S.W.2d 728 (Tex. Ct. App. 1992); *Mims* v. *Beall*, 810 S.W.2d 876 (Tex. Ct. App. 1991).[3] Finally, even if a negligent leasing claim did exist under Texas law, any such claim here would be barred by the discretionary function exception to the FTCA. See pp. 6-9, *supra*; *Webster* v.

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[3] The two state cases cited by petitioner (Pet. 24) are not to the contrary, since neither one recognized a cause of action for negligent leasing. In *Jewett* v. *Capital National Bank*, 618 S.W.2d 109 (Tex. Ct. App. 1981), the court recognized that a trustee appointed to administer a trust for the benefit of the settlor's children could "exercise his fiduciary duty in such a negligent manner that his lack of diligence will result in a breach of his fiduciary duty." *Id.* at 112. In *Penix* v. *First National Bank*, 260 S.W.2d 63, 68 (Tex. Ct. App. 1953), the court considered (and rejected on factual grounds) a claim that a testamentary trustee should be removed from that position because of alleged negligence or mismanagement. These cases thus at best recognize that under Texas law a claim of breach of fiduciary duty can be based on violation of a duty of care. They do not establish that Texas law recognizes a cause of action for negligent leasing by a trustee, apart from a claim of a breach of fiduciary duty.

United States, 823 F. Supp. 1544, 1552 (D. Mont. 1992) (finding claim of negligent leasing against the Secretary barred by the discretionary function exception), aff'd, 22 F.3d 221 (9th Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000